**ASIA COMMERCIAL FINANCE (M) BERHAD**

**v.**

**KAWAL TELITI SDN. BHD.**

SUPREME COURT, KUALA LUMPUR
DATUK CHONG SIEW FAI CJ SABAH & SARAWAK
DATO' PEH SWEE CHIN FCJ
DATUK SHAIK DAUD BIN HJ. ISMAIL JCA
[CIVIL APPEAL NO. 02-381-94]
22 SEPTEMBER 1995

***PRACTICE & PROCEDURE:*** *Res judicata - Applicability - Cause of action estoppel - Issue estoppel - Distinctions - Whether rights and liabilities of parties had merged into the judgment given in earlier proceedings - Whether there was a final judgment in respect of the same matter involving the same parties.*

***PRACTICE & PROCEDURE:*** *Res judicata - Scope of operation - Proper approach - Whether applied only to causes of action and issues which had been actually decided - Whether also applied to causes of action and issues which ought to have been but not brought up in previous proceedings.*

The appellant had granted a RM750,000 loan to the respondent to facilitate the development of a housing project undertaken by the latter. The loan was secured upon a certain charge and was granted on the condition that it was available for a certain period within which it must be fully disbursed out. The respondent failed to make full withdrawal of the money within the stipulated period, and that being the case, the appellant thereafter recalled the balance sum and refused further withdrawals. The result was that the intended housing project was forced to be grounded.

The respondent had fallen into default on the payment of interest and commitment fees following which the appellant obtained an order for the sale of the charged property. The respondent filed a motion in the High Court and applied for the setting aside of the order, as well as for damages which they alleged they had suffered as a result of the appellant's refusal to allow full disbursements aforesaid. This application was dismissed by the learned Judge and on appeal the dismissal was affirmed by the Supreme Court.

The respondent thereupon filed a fresh suit against the appellant claiming for damages for loss of profit on account of the failure of the said housing project. However, as this claim was identical to the claim for damages in the earlier motion, the appellant applied under O. 18 r. 19 Rules of the High Court 1980 to strike out the statement of claim therein, arguing that the claim, being so clearly tainted with *res judicata*, was an abuse of the Court's process. The learned Judge, on the authority apparently of *Kandiah Peter v. Public Bank* [1994] 1 MLJ 119, ruled that there was "no question of the plaintiff's statement of claim being frivolous, vexatious or an abuse of the process of the Court" and hence dismissed the plea of *res judicata* and the appellant's application. The appellant hence appealed.

Before the Supreme Court the main issue that arose was whether, having regard to the applicability or otherwise of *res judicata,* the O. 18 r. 19 application herein had been wrongly dismissed by the learned Judge.

**Held:**

**Per Peh Swee Chin FCJ (delivering the judgment of the Court):**

**[1]** The significance of *res judicata* lies in its effect of creating an *estoppel per rem judicatum*, which may take the form of either cause of action estoppel or issue estoppel. The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in Court for a particular remedy are determined in a final judgment and such right of action, that is the cause of action, merges into the said final judgment. The issue estoppel, on the other hand, means simply an issue which a party is estopped from raising in a subsequent proceeding.

**[2]** The doctrine of *res judicata* is not confined to causes of action or issues which the Court is actually asked to decide or has already decided. It covers also causes of action or issues or facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

**[3]** The respondent's case herein represents a classical case for the application of the doctrine of *res judicata* by way of cause of action estoppel. The claim for damages in the statement of claim and the claim for damages in the previous originating motion were clearly identical, resting as they were on the same facts or issues. Both claimed damages for the appellant's refusal to allow the respondent to utilise in full the identical loan of RM750,000 which allegedly resulted in the failure of the identical housing scheme.

**[4]** The *ratio decidendi* of *Kandiah Peter v. Public Bank* is that a chargee in an originating summons in the High Court who makes an application for an order for sale in a foreclosure proceeding does not commence an action or suit, but merely enforces his rights by exercising a statutory remedy against the chargor in default. Such foreclosure proceedings do not result in a final judgment so that the doctrine of *res judicata* cannot apply to subsequent proceedings between the same parties. In this case the refusal by the High Court of the relief sought by the respondent, i.e the claim for damages for not being allowed to draw completely the said loan in the said originating motion, was upheld by the Supreme Court which means that there was a final judgment made in respect of the claim. All rights and liabilities of both parties thus had merged into the judgment delivered in the earlier originating motion. The respondent hence cannot rely on the case of *Kandiah Peter* and the plea of *res judicata* must therefore succeed.

*[Appeal allowed].*

***[Bahasa Malaysia** Translation of Headnotes]*

***AMALAN & PROSEDUR:** Res judicata - Pemakaian - Estopel kausa tindakan - Estopel isu - Perbezaan - Samada hak-hak dan liabiliti pihak-pihak telah digabungkan ke dalam penghakiman yang telah diberikan dalam prosiding-prosiding awal - Samada terdapatnya penghakiman muktamad berhubung dengan perkara yang sama yang melibatkan pihak-pihak yang sama.*

***AMALAN & PROSEDUR :** Res judicata - Bidang pelaksanaan - Pendekatan yang wajar - Sama ada terpakai hanya kepada kausa-kausa tindakan dan isu-isu yang telah sebenarnya diputuskan - Samada juga terpakai kepada kausa-kausa tindakan dan isu-isu yang seharusnya telah diketengahkan tetapi telah tidak diketengahkan dalam prosiding-prosiding yang lalu.*

Perayu telah memberikan pinjaman sebanyak RM750,000 kepada defendan untuk memudahkan pembangunan sebuah projek perumahan yang telah dimulakan oleh defendan. Pinjaman itu telah dijamin oleh sesuatu gadaian dan telah diberikan dengan syarat ianya diberikan bagi sesuatu tempoh yang tertentu dalam mana ianya harus dibayar keluar sepenuhnya. Responden telah gagal untuk membuat pengeluaran sepenuhnya wang tersebut dalan tempoh yang telah ditetapkan, oleh yang demikian, perayu telah selepas itu menuntut kembali jumlah baki dan enggan membenarkan pengeluaran wang yang seterusnya. Akibat daripada itu projek tersebut terpaksa dihentikan.

Responden telah ingkar dalam pembayaran faedah dan fee komitmen, dan berikutan daripada itu perayu telah mendapatkan satu perintah untuk penjualan harta yang digadaikan itu. Responden telah memfailkan satu usul dalan Mahkamah Tinggi dan memohon untuk mendapatkan pengenepian bagi perintah tersebut, dan juga untuk gantirugi yang mereka katakan telah mereka alami akibat keengganan perayu untuk membenarkan pengeluaran sepenuhnya wang di atas. Permohon ini telah ditolak oleh Tuan Hakim yang bijaksana dan ketika rayuan penolakan tersebut telah disahkan oleh Mahkamah Agung.

Responden selepas itu memfailkan satu prosiding yang baru terhadap perayu, menuntut gantirugi bagi kehilangan keuntungan disebabkan oleh kegagalan projek perumahan tersebut. Walaubagaimanapun, oleh kerana tuntutan ini serupa dengan tuntutan untuk gantirugi dalam usul yang lebih awal, perayu telah memohon di bawah A. 18, k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 bagi membatalkan penyataan tuntutan di dalamnya, berhujah bahawa tuntutan tersebut, yang dengan jelas telah dicemar oleh *res judicata*, adalah suatu penyalahgunaan proses Mahkamah. Tuan Hakim yang bijaksana atas autoriti *Kandiah Peter lwn. Public Bank* [1994] 1 MLJ 119, memutuskan bahawa tidak terdapat "persoalan berhubung dengan penyataan tuntutan plaintif menjadi remeh, menyusahkan atau suatu penyalahgunaan proses Mahkamah", dan dengan itu, menolak rayuan *res judicata* dan permohonan perayu. Perayu oleh itu membuat rayuan.

Di hadapan Mahkamah Agung, isu utama yang timbul adalah samada, setelah menimbangkan pemakaian *res judicata* atau sebaliknya, permohonan A. 18 k. 19 di sini telah ditolak secara salah oleh Tuan Hakim yang bijaksana.

**Diputuskan:**

**Oleh Peh Swee Chin HMP (Menyampaikan penghakiman Mahkamah):**

**[1]** Pentingnya *res judicata* bergantung pada kesannya mewujudkan estopel *per rem judicatum*, yang mana boleh mengambil bentuk samada estopel kausa tindakan atau estopel isu. Estopel kausa tindakan terbit bilamana hak atau tanggungan-tanggungan yang melibatkan sesuatu hak untuk mengambil sesuatu tindakan dalam Mahkamah untuk sesuatu remedi sudah ditentukan dalam penghakiman yang muktamad dan hak estopel yang sedemikian, iaitu kausa tindakan, bersatu ke dalam penghakiman muktamad tersebut. Estopel isu, sebaliknya, hanya bermaksud suatu isu yang mana sesuatu pihak diestop daripada membangkitkannya dalam prosiding yang berikutnya.

**[2]** Doktrin *res judicata* tidak terhad kepada kausa-kausa tindakan atau isu-isu yang mana Mahkamah sebenarnya diminta putuskan atau telah pun putuskan. Ianya meliputi kesemua kausa-kausa tindakan atau isu-isu atau fakta-fakta yang mana, walaupun telah tidak diputuskan kerana ianya telah tidak dikemukakan disebabkan oleh kecuaian, perbuatan yang tidak disengajakan ataupun dengan sengajanya, adalah dengan jelasnya merupakan sebahagian dari hal-perkara litigasi tersebut yang seharusnya telah dibangkitkan, sehingga ianya akan menjadi suatu penyalahgunaan proses Mahkamah bagi membenarkan satu prosiding baru dimulakan berhubung dengannya.

**[3]** Kes responden di sini merupakan satu kes yang klasik bagi pemakaian doktrin *res judicata* melalui estopel kausa tindakan. Tuntutan untuk gantirugi dalam penyataan tuntutan tersebut dan tuntutan bagi gantirugi dalam usul pemula terdahulu adalah jelas serupa atau sama, kerana bergantung pada fakta-fakta atau isu-isu yang sama. Kedua-duanya menuntut gantirugi bagi keengganan plaintif untuk membenarkan responden menggunakan sepenuhnya pinjaman yang sama sebanyak RM750,000 yang mana dikatakan telah menyebabkan kegagalan rancangan perumahan yang sama juga.

**[4]** *Ratio decidendi* kes *Kandiah Peter lwn. Public Bank* adalah bahawa pemegang gadaian dalam satu saman pemula di Mahkamah Tinggi yang membuat satu permohonan bagi perintah untuk penjualan dalam suatu prosiding halang-tebus tidak memulakan tindakan atau guaman, tetapi hanya menguatkuasakan hak-haknya dengan melaksanakan remedi berkanun terhadap penggadai dalam kemungkiran. Prosiding-prosiding halang-tebus yang sedemikian tidak membawa kepada penghakiman muktamad dan oleh sebab itu doktrin *res judicata* tidak boleh terpakai kepada prosiding-prosiding yang berikutnya antara pihak-pihak yang sama. Dalam kes ini keengganan oleh Mahkamah Tinggi bagi memberikan relief yang dipohon oleh responden iaitu tuntutan untuk gantirugi kerana tidak dibenarkan mengeluarkan sepenuhnya pinjaman dalam usul pemula tersebut, telah dipertahankan oleh Mahkamah Agung yang bermakna bahawa terdapatnya penghakiman muktamad yang telah dibuat berhubung dengan tuntutan tersebut. Kesemua hak-hak dan tanggungan kedua-dua pihak dengan itu telah bercantum atau bersatu ke dalam penghakiman yang disampaikan dalam usul pemula yang lebih awal. Responden dengan itu tidak boleh bergantung pada kes *Kandiah Peter* dan rayuan *res judicata* mestilah dengan itu berjaya.

*[Rayuan dibenarkan].*

**Cases referred to:**
*Kandiah Peter v. Public Bank [1994] 1 MLJ 119* ***(dist)***
*Henderson v. Henderson [1843] 3 Hare 100* ***(refd)***
*Kok Hoong v. Leong Cheong Kwang Mines Ltd. [1964] MLJ 49* ***(refd)***
*Hoystead v. Commissioner of Taxation [1962] AC 155* ***(refd)***
*Public Trustee v. Kenward [1967] 2 All ER 870* ***(refd)***
*Conquer v. Boot [1928] 2 KB 336* ***(refd)***
*Chamberlain v. Deputy Commissioner of Taxation [1988] 62 ALJR 324* ***(cit)***
*L E Walwin & Partners Ltd. v. West Sussex County Council [1975] 3 All ER 604* ***(refd)***
*Lawdor v. Gray [1984] 3 All ER 345* ***(refd)***
*Greenhalgh v. Mallard [1947] 2 All ER 255* ***(refd)***
*Yat Tung Investment Co. v. Dae Heng Bank & Anor. [1975] AC 581* ***(refd)***
*SCF Finance Co. Ltd. v. Masri & Another (No. 3) [1987] QB 1028* ***(refd)***
*Bell v. Holmes [1956] 1 WLR 1359* ***(refd)***
*Superintendent Pudu Prison v. Sim Kie Chong [1986] 1 MLJ 494* ***(refd)***

**Legislation referred to:**
Rules of the High Court 1980, O. 18 r. 19
Evidence Act 1950, s. 40

*For the apellant - Teo Cheng Wee (Wan Marzimin with him); M/s. Khaw & Hussein*
*For the respondent - Kumar Kathigesu; M/s. Mahalingam & Co.*

## JUDGMENT

**Peh Swee Chin FCJ:**

This appeal once again raises the question of the plea of *res judicata* which has arisen quite frequently e.g., for the sitting of the Federal Court for the week commencing on

17 July 1995, three separate appeals, inclusive of the instant appeal were listed for hearing all involving and depending on the decision of such a plea. The frequency with which this plea has surfaced could have been caused by certain controversial aspects in the law relating to it, so that it behoves us to state our point of view on those aspects.

In the instant appeal, the High Court below has dismissed earlier an application under O. 18 r. 19 from the defendant (hereinafter called the finance company) to strike out the plaintiff's statement of claim on grounds, *inter alia*, of a plea of *res judicata*, ie. in turn, of its being an abuse of process of the Court, (the plaintiff is hereinafter called the borrower). The learned Judge dismissed the application, holding, *inter alia* and in effect that the plea of *res judicata* was not successful stating that there was "no question of the plaintiffs statement of claim being frivolous or vexatious or an abuse of process of the Court"; hence this appeal. His Lordship felt bound also by the decision of *Kandiah Peter v. Public Bank* [1994] 1 MLJ 119, a decision of the Supreme Court.

The borrower's statement of claim claims special damages for loss of profit in the sum of RM1,015,700 and general damages in connection with a housing development or proposed housing development which could not get off the ground on account of the finance company allegedly refusing to disburse completely an agreed loan of RM750,000. The said statement of claim, in so far as it relates to the defendant's plea of *res judicata*, appears to be based primarily on a letter of offer dated 14 November 1985 to grant the said loan to the borrower from the finance company, the material provisions of which are set out below:

Asia Commercial Finance (M) Berhad

14 November 1985

Kawal Teliti Sdn Berhad
33-A, Jalan Goh Hock Huat
Kelang
41400 Selangor

Attn: Mr Tan Seng

Dear Sirs,

**Fixed Loan Of RM750,000 And End-Finance Facility Of RM1.5 Million**

We are pleased to inform you that our Company has approved for your use a fixed loan of RM750,000 and end-finance facility of RM1.5 million, based substantially on the following terms and conditions:

**Fixed Loan**

1. Amount of Loan

   RM750,000 (Ringgit: Seven Hundred and Fifty Thousand Only)

2. Interest Rate

   4 per cent per annum above the Base Lending Rate (BLR) of Asia Commercial Finance (M) Berhad and calculated on basis of monthly rest. Our current BLR is 12 per cent per annum.

3. Period of Loan

   Not exceeding eighteen (18) months from date of first draw-down.

Security

(a) First legal charge over thirty-two (32) individual lots held under Title Nos. H S(M) 2690 - 2696, 2699 - 2709 and 2724 - 2737 for Lot Nos. 832 - 838, 841 - 851 and 866 - 879 respectively, Section One, Mukim of Tanjong Duabelas, Tempat of Banting, Selangor.

(b) ...

5. ...

6. Repayment

(a) Servicing of monthly interest in arrears -

(b) ...

7. Availability Period

The first drawdown must be effected within three (3) months from date of offer, failing which the loan shall be treated as lapsed and cancelled. The loan shall be available for fifteen (15) months from date of offer. Thereafter, any undrawn portion of the loan shall be treated as lapsed and cancelled. [Clauses 8 to 15, Parts II, III, IV and V are omitted]

If the above stated terms and conditions are acceptable to you, kindly confirm acceptance on the duplicate copy of this letter and return to us within fourteen (14) days from date hereof, failing which the offer shall be treated as lapsed and cancelled.

| | |
|---|---|
| Yours faithfully<br>Asia Commercial Finance (M) Bhd | I/We confirm acceptance<br>of the above facility |
| Signed | Signed |
| Andrew Goh Hock Chuan<br>General Manager | Kawal Teliti Sdn Bhd<br>Managing Director |

In pursuance of other provisions of the said letter of offer, the charge of certain lands of the borrower was executed by the borrower in favour of the finance company.

Subsequently, for failure to pay interest pursuant to clause 6(a) of the said letter of offer, commitment and legal fees, the finance company served a Form 16D under the National Land Code, being the preliminary step prior to applying for an order of a sale from the relevant Land Administrator. The finance company subsequently applied for and obtained a statutory order of sale of the charged lands on 12 November 1987.

Then on 22 January 1988, the borrower, (as plaintiff), filed an originating motion being Kuala Lumpur High Court Originating Motion No. S7-32-9-1988 against the finance company, (as defendant), as follows:

**Notice of Motion**

TAKE NOTICE that on Wednesday the 10th day of February 1988 at 10.00 o'clock in the forenoon or as soon thereafter as he can be heard, Counsel for the abovenamed plaintiff will move the Court for an Order that:

i. the Order for sale made on 12 November, 1987 under s. 253 of the National Land Code 1965 against the plaintiff in respect of the above properties be set aside;

ii. a declaration that on the true construction of the said agreement and in the events which have happened the said loan is for a period of 18 months and the time commences to run from the 1st drawdown;

iii. the defendant do pay the plaintiff damages to be assessed;

iv. such further or other or consequential directions or orders be given or made as the Honourable Court deems fit or proper; and

v. the costs of and incidental to this application be borne by the defendant in any event

The grounds of the application appear and are shown in the affidavit annexed and filed herein.

Dated the 22 January, 1988.

| | |
|---|---|
| Signed | Signed |
| Solicitors for the Plaintiff | Senior Assistant Registrar |
| abovenamed | High Court, Kuala Lumpur |

From the supporting affidavit of the originating motion, prayer (iii) therein is to be borne in mind as it is similar to the claim for damages in the statement of claim of the present action concerned herein.

The gist of the borrower's supporting affidavit for the said originating motion was first, that the said loan of RM750,000 mentioned in the said letter of offer, was available for a period of 15 months from the date of offer ie. from 14 November 1985 until 14 February 1987 during which time, the borrower must draw upon the said loan completely, if not, the undrawn balance would be treated "lapsed and cancelled' and secondly the first draw down of the said loan must be made within 3 months from the date of offer ie. by 14 February 1986. All this was indeed in accordance with clause or paragraph 7 of the said letter of offer set out above, and it was common ground for the said clause 7 to be so interpreted just as stated.

Because of the undisputed and subsequent request made to the finance company by the borrower, the finance company agreed to allow such lst draw-out to be done by 31 March 1986 instead of the original date of 14 February 1986 aforesaid. Thus, the time for the first draw-down was extended by consent up to 31 March 1986.

In amplication of what has just been stated above it was common ground that both parties meant that going merely by clause 7 of the letter of offer, the loan of RM750,000 should be completely utilized and drawn-out within 15 months from date of offer ie. by 14 February 1987.

Then, even by 4 May 1987, the said loan had still not been "drawndown" or utilized by the borrower completely, and on the same date, the finance company informed the borrower that the borrower could no longer draw-down on the unused balance of the said loan as the last day for draw-down or rather draw-out was on 14 February 1987.

In reply, the borrower wrote to the effect that by allowing the extension of time to make the first draw-down aforesaid, the finance company had "also waived the whole of the said paragraph 7 in so far as the same" provided that the said fixed loan should be available to and drawn out (completely) by the borrower for 15 months from date of offer i.e. by 14 February 1987" and the borrower, to quote further, "and/or alternatively is estopped from reliance on paragraph 7 of the letter of offer".

Due to the refusal of the finance company in allowing the draw-out of the balance of the said loan, (the balance being RM400,000), the borrower alleged it could not carry on the housing scheme or housing development.

The learned Judge in the said originating motion dismissed it with costs with a 2 page judgment in finding no merits. The said judgment is set out below:

**Judgment**

This was an application by the plaintiffs to have an auction of their properties ordered by the Land Office set aside.

Mr Krishna Aiyar submitted that there were four points to be considered - the period of the fixed loan, in what way the interest was to be paid, whether the calculation of interest was right and fourthly the validity of Form 16D.

Counsel for both parties made lengthy submissions but I do not propose to go into them in great detail. Suffice it to say that I came to the conclusion that there were no merits whatsoever in the plaintiffs' application. The period of the loan and the calculation of interest are sufficiently documented in the charge documents and exhibits in the affidavits. As for the Form 16D the main contention raised by the plaintiffs was that in their letter of demand the defendants had entered the sum of commitment fees and therefore Form 16D should be held invalid. I am afraid I did not agree with this submission. The letter of demand which included this fees did not render the subsequent Form 16D invalid.

In the circumstances therefore I dismissed the plaintiffs' application with costs.

Dated this 7 June 1988.

Signed
(Dato' Ajaib Singh)
Judge
High Court Malaya
Kuala Lumpur

Going by para 1 of the short judgment above, it appears that the learned Judge had only singled out and dealt only with prayer (1) of the originating motion. We think it could be safety assumed that he had singled out prayer (1) for emphasis and he had adjudicated on all the other prayers, as he was bound to and he in fact discussed very briefly the period of the fixed loan - the subject of prayer (2) and the basis for potentially making an order in terms of prayer (3).

The borrower appealed to the Supreme Court in Supreme Court Civil Appeal No. 235-88 and such appeal was dismissed with costs after hearing both parties.

The finance company had opposed all the contentions of the borrower in the said originating motion.

In the instant appeal before us the statement of claim filed in the Court below, asks for damages for loss of profit and other damages in connection with the failure of housing scheme or development due to the denial of the right to use the balance of the said loan of RM750,000.

The statement of claim gives the same reasons of the extended time for the first drawdown. The statement of claim says further to the effect that the said loan was subject to "2 conditions precedent" ie. the condition about the time for the first draw-down and the condition about the time of availability of the said loan of RM750,000 and both conditions were "waived" by the finance company on 22 March 1986 ie. the date when the first draw-down was made in the same extended time, or the finance company was estopped from not lending the balance of the said loan etc.

Despite the employment of different wording by the present solicitors in the action concerned herein from the previous solicitors of the borrower in the said originating

motion, the claim for damages in the present statement of claim and the claim for damages in the previous originating motion are in substance identical resting on the same facts or issues.

The finance company in an affidavit supporting an application filed in the Court below, under O. 18 r. 19 to strike out the statement of claim, has pleaded *res judicata*, and referred to the particulars of the earlier affidavit of the borrower in respect of the earlier originating motion.

The learned Judge in the Court below however in effect dismissed the plea of *res judicata*, and consequently also the finance company's application under O. 18 r. 19 of the Rules of the High Court as described earlier, hence the appeal before us. To determine if the action concerned herein below is doomed to failure (for if so, the application under O. 18 r. 19 would have been wrongly dismissed) one has to deal with certain controversial aspects of the plea of *res judicata* referred to in the beginning.

What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an *estoppel per rem judicature*. When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation - *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action - *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

Since a *res judicata* creates an estoppel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say that *res judicata* is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.

The starting point ought to be the celebrated passage by Wigram, V.C., in the case of *Henderson v. Henderson* [1843] 3 Hare 100 115 which is:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

It may be of interest to point out that one of the exceptional special cases is the effect of a default judgment in subsequent proceedings between the same parties, a default judgment is different from a final judgment on the merits, the latter is the category to which the judgment in the said originating motion given before the filing of the action as concerned directly herein below belongs. Please see the finer points of law in regard to default judgments from the position of the doctrine of *res judicata* in *Kok Hoong v. Leong Cheong Kwang Mines Ltd.* [1964] MLJ 49. We have thus mentioned this question of default judgment in passing as it has sometimes been a small source of confusion to the litigants.

To revert to that famous passage set out above, the next step is to state our view on its scope of operation or approach towards such scope which has given rise to certain controversial aspects referred to earlier. Bearing in mind the well-known relevancy of a previous judgment in barring a second suit, eg. please see s. 40 of Evidence Act, 1950, it will be readily understood that when Wigram. V. C. spoke of "points", the points should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties. The relevant case law revolves itself into this understanding. Lack of this understanding causes, in our view, a fair share of the confusion in connection with the famous passage of Wigram, V.C. which Lord Shaw in *Hoystead v. Commissioner of Taxation* [1962] AC 155, 170 spoke of as "settled law" in the Privy Council.

Thus, there are in fact two kinds of *estoppel per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.

The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in Court for a particular remedy are determined in a final judgment and such right of action ie. the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be re-litigated between the same parties because it is *res judicata*.

In order to prevent multiplicity of actions and also in order to protect the underlying rationales of *estoppel per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment and which were not either deliberately or due to inadvertence. A few cases below will illustrate the point.

In *Public Trustee v. Kenward* [1967] 2 All ER 870 in which an account of administration proceedings was taken of defendant's indebtedness to his deceased wife's estate. He made various counterclaims of sums due to him but omitted to raise the question that certain land forming part of his wife's estate was a partnership asset belonging to both his deceased wife and himself. When the plaintiff, the Public Trustee subsequently claimed payment of sums due from the defendant the defendant was estopped from raising the question of the said partnership land.

In *Conquer v. Boot* [1928] 2 KB 336 the plaintiff obtained judgment after a contest in respect of a breach of warranty to build a house in a good and workmanlike manner. Subsequent to the judgment the plaintiff suffered further loss or further loss emerged by virtue of the same breach of warranty. Such further loss might not have been apparent at the time of first action. It was held that the cause of action was *res judicata* and he was estopped from asserting for the second time the same breach of warranty. It is interesting to note that in the second action, the same breach was described differently but this did not prevent the estoppel from operating.

In *Chamberlain v. Deputy Commissioner of Taxation* [1988] 62 ALJR 324, the High Court of Australia applied the doctrine of *res judicata* to prevent recovery of the balance of understated tax as a result of previously omitting a last digit of zero.

Again in *L E Walwin & Partners Ltd. v. West Sussex County Council* [1975] 3 All ER 604, it was held that plaintiff's claim in 1975 to a right to maintain a barrier on certain road on ground of an only earlier partial dedication of it, was faced with a judgment in 1958, in which the predecessor in title of the plaintiff had been a party to proceedings before Quarter Sessions over the status of the same road, and in which the said predecessor in title failed to raise the question of the right to maintain such a barrier. It was held that the failure of the said predecessor in title ie. a privy to the present plaintiff, to raise the question estopped the plaintiff from raising the said question and the action failed.

On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more ie. that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawdor v. Gray* [1984] 3 All ER 345, 350 who said: "Issue estoppel... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action".

It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment.

There is one school of thought that issue estoppel applies only to issues actually decided by the Court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the Court, are still covered by the doctrine of *res judicata* ie. doctrine of *estoppel per rem judicatum*.

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of *estoppel per rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the Courts being found always one step behind the resulting increase in litigation.

It is further necessary at this stage to understand the import of the words in the said famous statement ie "... every point which properly belonged to the subject of litigation ... " which Somervell LJ explained in *Greenhalgh v. Mallard* [1947] 2 All ER 255, 257 as follows:

> ... *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

This explanation of Somervell LJ was also quoted with approval in the Privy Council in *Yat Tung Investment Co. v. Dae Heng Bank & Anor.* [1975] AC 581

In *Yat Tung's* case itself, the bank sold some property to Yat Tung which mortgaged the same property back to the bank. Yat Tung defaulted on payment of interest on the mortgage and the bank exercising its right of sale, sold the same property to the 2nd respondent. After such sale to the second respondent in 1969, Yat Tung sued the bank on the ground that the bank's sale of property to Yat Tung in the first place was a sham and therefore a nullity and the bank counter-claimed for loss on re-sale to the 2nd respondent, denying the alleged nullity. Yat Tung failed in this first action and the bank succeeded. After the judgment Yat Tung sued in 1972 once more in a second action on the ground that the subsequent sale by the bank to the 2nd respondent of the same property was fraudulent etc. on ground of some collusion between the bank and the 2nd respondent. It will be remembered that the sale to the 2nd respondent took place before Yat Tung filed the earlier action. The statement of claim was ordered to be struck out as matters which were available in the earlier action. On appeal and even further appeal to the Judicial Committee, the order was confirmed on the ground that doctrine of *res judicata* applied.

Thus, in *SCF Finance Co. Ltd. v. Masri & Another* (No. 3) [1987] QB 1028 the English Court of Appeal held that even a reservation of an issue by a party in a previous proceeding was ineffective to prevent the estoppel from arising against the said party, where the said party had pleaded that issue but elected not to proceed on the issue in the previous proceeding. It was held she was not entitled to assert that issue afresh in subsequent proceedings, even if that issue was not heard and determined and it was even "reserved".

In *Bell v. Holmes* [1956] 1 WLR 1359, that the issue of the plaintiff's own liability for contributory negligence, when suing the defendant, was the same issue of both their respective liabilities towards a third person arising from the same collision in an earlier action, and the learned Judge held that after comparing the pleadings of the action before him and the pleadings in the previous County Court proceedings, that the issues of fact and the evidence to support them were identically the same. The plaintiff was estopped from denying that he was 5/6 to blame as was adjudged in the previous County Court action.

In *Hoystead v. Commissioner of Income Tax, supra*, in assessment for financial year 1918-1919, the trustees of a deceased person's estate claimed, by virtue of certain section of certain statute, a deduction of £5,000 in respect of each daughter of the deceased as the annual income was divisible among the testator's daughters. The claim was disputed and a case was stated for High Court - which then decided that such deductions could be made for all the six surviving daughters. Subsequently upon the assessment for the financial year 1920 to 1921, the Commissioner this time allowed only one deduction contending that the daughters were not "joint owners" within the meaning of that certain statute. The Privy Council held that though in previous litigation, no express decision was given whether the daughters were such joint owners, it being assumed and admitted they were; the admission that they were joint owners having been fundamental to the previous decision, the Commissioner was estopped from asserting before the Judicial Committee that the daughters were not joint owners.

A word of caution is required about the words of "exercising reasonable diligence" in the said famous passage. The words do not, in our view, necessitate a mental exercise of

making a finding as to whether there was diligence, or reasonable diligence, in the earlier failure to bring it at the previous trial, the issues which should have been brought in the earlier action and which were not or in asserting all other causes of action arising out of the same facts in the earlier action and which were not.

The words ought to be understood as a gentle rebuke for the failure aforesaid, ie. despite the fact that the party had the opportunity of bringing forward all such issues or asserting all such causes of action; and the words are not meant to impose a pre-condition for applying the doctrine of *res judicata* but are meant to say that the said non-bringing of the issues would count in any event irrespective of whether the said failure was or was not deliberate or due to inadvertence or negligence. Otherwise, the words would have virtually all but destroyed the efficacy of *estoppel per rem judicatum*.

Another source of small confusion is the rule that generally an estoppel, of which an *estoppel per rem judicatum* is a kind, as the name implies, has to be pleaded. But in *Superintendent Pudu Prison v. Sim Kie Chong* [1986] 1 MLJ 494, 498, Abdoolcader, SCJ, held to the effect that the Court has the inherent jurisdiction to dismiss an action by applying the doctrine of *res judicata* against a party even if it has not been pleaded. We venture to think the reason for the ratio is that an estoppel or exclusion of evidence is based on a question of public policy ie. in this case, the question of public policy that there should be finality in litigation, is more vigorous in excluding evidence and need not be pleaded, unlike an ordinary estoppel which should be pleaded.

We think we have dealt with certain parts of the doctrine of *res judicata* sufficiently for the purpose of determining the instant appeal. We now revert to the factors in the instant appeal.

Looking at the wording of both the earlier originating motion aforesaid and the statement of claim in the action concerned herein and looking also at the content of the supporting affidavit of the earlier originating motion, the causes of action of both proceedings are identical. Both claim damages for failure or refusal of the identical finance company to allow the same borrower to utilize in full the identical loan of RM750,000 causing loss consequent upon the failure of the identical housing scheme or housing development to be proceeded further. The action in the Court below and immediately concerned herein claims only one relief or one relief in substance, damages for refusal to allow the borrower to borrow the full sum of RM750.000.

Again all rights and liabilities of both parties had merged into the judgment delivered on the said originating motion and the judgment was confirmed by the Supreme Court and it is therefore final. The cause of action estoppel applies unquestionably against the borrower and the borrower's case represents a classical case for the application of the doctrine of *res judicata* by way of a cause of action estoppel; the cause of action being the action for damages for refusal of the finance company to allow the borrower to utilize or borrow completely the total sum of agreed loan. The effect of a cause of action estoppel is so absolute that it is really unnecesary to delve further into the issues of law or of fact. What we just said however is subject to what is to be said further below.

Besides the question of *res judicata* raised by the finance company, the finance company also pleads a point of limitation against the borrower. Having held that the cause of action estoppel applies, it will be unnecessary to decide on this unless the borrower's further submission of the applicability to the instant appeal of the Supreme Court case of *Kandiah Peter, supra,* succeeds; that case will presently be looked into.

The *ratio decidendi* of that case is that a chargee in an originating summons in the High Court who makes an application for an order of sale in a foreclosure proceeding does not commence an action or suit, but merely enforces his rights by exercising a statutory remedy against the chargor in default. Such foreclosure proceedings do not result in a final judgment; so that the doctrine of *res judicata* cannot apply to subsequent proceedings between the same parties as one of the essential requirements of the said doctrine is the existence of a final judgment in the previous proceeding and in a foreclosure proceeding such a final judgment is missing.

The equivalent of the said foreclosure proceeding of a charge action in High Court for the statutory remedy of an order of sale commenced by an originating summons should be the application to the Land Administrator of the relevant Land Office for a similar order of sale in respect of a land office title. The said originating motion in the High Court cannot be described as a foreclosure proceeding, neither is it one, for among other things, the order of sale had already been granted (some time before the separate and distinct originating motion was filed) in an earlier foreclosure proceeding before the Land Administrator in question. The refusal by the High Court of the said relief, ie. the claim for damages for not being allowed to draw completely the said loan in the said originating motion was upheld by the Supreme Court. It will be otiose to attempt to treat the said originating motion as a foreclosure proceeding. The borrower cannot rely on the case of *Kandiah Peter*. The plea of *res judicata* therefore still succeeds.

We therefore allow the appeal, setting aside the order of Court below and we further make an order in terms of the application dated 23 August 1993 to strike out the statement of claim to dismiss the action. We further order costs against the respondent here and below. Deposit is to be refunded to the appellant.